IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

FRIDAY, THE 2ND FEBRUARY 2007 / 13TH MAGHA 1928

CRL.A.No. 1595 of 2006(A)

SC.1169/2005 OF THE ADDL. SESSIONS COURT FOR TRIAL OF ABKARI ACT CASES, NEYYATTINKARA
CP.172/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT-I, NEYYATTINKARA

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APPELLANT:

MANOHARAN,
C.NO.518, CENTRAL PRISON,
TRIVANDRUM.

BY ADV. ADV.PRADEEP K.P(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA,
REPRESENTED BY A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-02-2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 1595 of 2006

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Dated, this the 2nd day of February 2007

JUDGMENT

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant who was the 2nd accused in S.C.No.1169/2005 on the file of the Addl. Sessions Court for Trial of Abkari Act Cases, Neyyattinkara, challenges the conviction entered and the sentence passed against the appellant for an offence punishable under sec.58 of the Abkari Act.

2. The case of the prosecution is that on 8.2.2004 at about 3.30 p.m. on the public road leading to the Parayil temple at a spot situated about 600 metres to the south of Pamamcodu junction within the limits of the Nemom Police Station, the two accused persons were found in possession of 4 litres of illicit arrack in a 5 litre jerry can and a glass tumbler and the sale proceeds obtained from the retail sale of illicit arrack. The accused have thereby committed offences punishable under secs.55(a) and 55(i) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against them by the court below for offences punishable under secs.55(a) and 55(i) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 6

witnesses as PWs.1 to 6 and got marked 7 documents as Exts.P1 to P7 and 2 material objects as M.Os.1 and 2.

4. After the close of the prosecution evidence, the accused were questioned under sec.313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against them in the evidence for the prosecution. They denied those circumstances and maintained their innocence.

5. Since the court below did not consider this a fit case for recording an order of acquittal under sec.232 Cr.P.C, the accused were called upon to enter on their defence and to adduce any evidence which they might have in support thereof. They did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dt. 12.5.2006 found both the accused guilty of an offence punishable under sec.58 of the Abkari Act and sentenced them each to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.1 lakh and, on default to pay the fine, to suffer rigorous imprisonment for three months. It is the said judgment which is assailed in this appeal by the Ist accused.

7. I heard Adv. Sri. Pradeep K.P., the learned counsel who defended the appellant on State Brief, and Adv. Sri K.S.Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not?

THE POINT

9. PWs.1 and 2 are the independent witnesses to the arrest, search and seizure. Eventhough both of them admitted their signatures in Ext.P1 mahazar prepared by the detecting officer, they turned unfriendly to the prosecution. P.W.3 is the police constable who accompanied the detecting officer. P.W.4 was the Sub Inspector of Nemom Police Station who detected the offence. P.W.5 who was the Sub Inspector who succeeded P.W.4., conducted the investigation. P.W.6 is the subsequent Sub Inspector who verified the investigation and laid the charge before court.

10. After an anxious re-appraisal of the oral and documentary evidence and after hearing both sides, I am of the view that the prosecution has not succeeded in establishing the guilt of the appellant beyond reasonable doubt. Ext.P1 is the contemporaneous mahazar said to have been prepared by PW.4 from the scene of detection itself. Going by the recitals in Ext.P1 it was the 2nd accused who was holding the jerry can containing the contraband liquor in one hand and the glass tumbler in the other and when the police party approached him and interrogated him, he revealed his name as Rajesh and also revealed the name of the other person as Manoharan (the 1st accused) who had made good his escape seeing the police party. Ext.P1 mahazar further states that the 2nd accused gave a statement to PW.4 to the effect that since he did not have palms of both hands, he was vending arrack with the help of the 1st accused. In the judgment dated 11-12-2006 in Crl.A. 1359/06

this court had found the prosecution case highly unbelievable. It was observed that if the 2nd accused was incapable of vending arrack or even holding arrack for the reason that he did not have both his palms, it was inconceivable as to how the police party headed by P.W.4 saw the 2nd accused holding the jerry can having a capacity of 5 litres in one hand and the glass tumbler in the other hand. But from the witness box P.W.4 had a different version to say that it was the first accused who was seen pouring the contends of the can into a glass tumbler and seeing the police party the first accused took to his heels leaving the can and the glass tumbler there itself in the vicinity of the 2nd accused who was standing there. In the aforementioned Appeal, this Court had noted that this version of P.W.4 in the witness box was diametrically opposite to what was recited in Ext.P1 contemporaneous mahazar. When the specific case of the prosecution is that it was the 2nd accused who was found in possession of the contraband liquor, this Court held that the said version of the prosecution was doubtful.

11. There is yet another unsurmountable hurdle for the prosecution to bring home the guilt of the appellant. In Ext.P1 mahazar, it is stated that P.W.4 had taken a sample of the contraband liquor from the jerry can at the scene of detection itself. Ext.P1 does not mention the quantity of the sample or the capacity of the bottle in which the sample was taken. But when it came to the stage of evidence, PW.4 deposed that he took 180 ml. as sample of the contraband liquor in a bottle of 375 ml. capacity and produced

the same in court. The recitals in Ext.P1 would go to show that both the bulk quantity as well as the sample bottle were both sealed from the spot itself. But among the properties produced before court on 9-2-2004 the sample bottle was not there. Even the white jerry can which was produced as Item I was not a sealed one.

12. The prosecution relies on Ext.P6 certificate of chemical analysis dt. 25.5.2005 to contend for the position that the sample taken from the contraband liquor allegedly carried by the two accused persons contained 22.74% by volume of ethyl alcohol. It is not shown as to which was the sample sent from the committal court to the chemical examiner's laboratory and who took the sample and on what date. Ext.P6 certificate of analysis refers to a letter dt. 31.5.2004 of the J.F.C.M.-I, Neyyattinkara. Neither the said letter not it's office copy was produced or marked in the case. There is no document recording the proceedings of the committal magistrate to indicate whether any sample was drawn from the can allegedly containing contraband liquor produced as item No.1 in the property list. Hence, even if the said can which was not received in court in a sealed condition could be presumed to be the can allegedly seized from the possession of the appellant, there is nothing to show that a sample was drawn from the said can by any member of the court staff attached to the J.F.C.M. Court-I, Neyyattinkara. The thondy section clerk who is ordinarily the custodian of all properties produced in a court was neither cited nor examined to prove the drawing of sample and the despatch of the same to

the chemical examiner's laboratory in a tamper-proof condition. It is well settled that when properties change several hands before finally reaching the hands of the chemical examiner, the prosecution has a duty to establish that it was the same property which was allegedly seized from the accused which eventually found its way into the hands of the chemical examiner and that too in a tamper-proof condition (vide State of Rajasthan v. Daulat Ram - AIR 1980 SC 1314 and Valsala v. State of Kerala - 1993 (2) KLT 550). In the absence of this link evidence, it cannot be said that the prosecution has succeeded in establishing that the appellant was found in possession of contraband liquor. The conviction entered and the sentence passed against the appellant overlooking these vital aspects of the matter cannot, therefore, be sustained and are accordingly dislodged. The appellant is found not guilty of the offence punishable under Sec. 58 of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from the prison forthwith unless his continued detention is found necessary in connection with any other case.

In the result, this Criminal Appeal is allowed setting aside the conviction entered and the sentence passed against the appellant.

(V.RAMKUMAR, JUDGE)

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V. RAMKUMAR, J.

CRL.A.NO.1595 OF 2006

02-02-2007

JUDGMENT